RECORD AND BRIEFS.

No. 15-1439

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CYAN, INC., *et al.*,

Petitioners,

v.

BEAVER COUNTY EMPLOYEES RETIREMENT FUND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

BRIEF OF ALIBABA GROUP HOLDING LIMITED, GOPRO, INC., KITOV PHARMACEUTICALS HOLDINGS LTD., LENDINGCLUB CORPORATION, NOVUS THERAPEUTICS, INC., PACIFIC BIOSCIENCES OF CALIFORNIA, INC., SIERRA ONCOLOGY, INC., SNAP INC., AND XBIOTECH INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JONATHAN K. YOUNGWOOD
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

JAMES G. KREISSMAN
Counsel of Record
SIMONA G. STRAUSS
STEPHEN P. BLAKE
ELIZABETH H. WHITE
SIMPSON THACHER & BARTLETT LLP
2475 Hanover Street
Palo Alto, CA 94304
(650) 251-5000
jkreissman@stblaw.com

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are issuers of securities that trade on either the New York Stock Exchange or NASDAQ. *Amici* have all been sued in putative class actions under the Securities Act of 1933 ("Securities Act") in state court in California. This brief is submitted in support of Petitioners' assertion that the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") eliminated state court jurisdiction over covered class actions that allege only claims under the Securities Act and that such actions are subject to exclusive federal court jurisdiction.

Amici are Alibaba Group Holding Limited, GoPro, Inc., Kitov Pharmaceuticals Holdings Ltd., LendingClub Corporation, Novus Therapeutics, Inc. (formerly Tokai Pharmaceuticals, Inc.), Pacific Biosciences of California, Inc., Sierra Oncology, Inc. (formerly ProNAi Therapeutics, Inc.), Snap Inc., and X Biotech Inc.

SUMMARY OF ARGUMENT

Congress passed the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("PSLRA"), to impose stricter substantive and procedural

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1. Pursuant to Supreme Court Rule 37.3(a), *amici curiae* submit this brief in support of a case before the Court for oral argument. Petitioners' and Respondents' consent to the filing of amicus briefs have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party or counsel for a party authored any portion of this brief or made a monetary contribution intended to fund its preparation or submission. No person other than *amici curiae*, its members, or its counsel have made such a monetary contribution.

controls on securities fraud claims and curtail abusive practices in such litigation. In reaction, many plaintiffs flocked to state courts, where they hoped that differences in procedural and substantive law would provide them a friendlier forum. Congress responded by enacting the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("SLUSA"). SLUSA eliminated state court subject matter jurisdiction over class actions asserting claims under the Securities Act, ch. 38, 48 Stat. 74. SLUSA's text and history both make plain why Congress chose to do so: Congress wanted class actions bringing federal securities law claims to be litigated in federal court, under uniform national rules, to promote uniformity and consistency in securities class action litigation.

The interpretation of SLUSA espoused by Respondents flies in the face of that design. And because that interpretation has been erroneously followed by some courts over the past decade, this Court need not wonder what practical impact it would have. The evidence is already there: Respondents' interpretation has led to an explosion of state court Securities Act class actions. It has subjected issuers to multiple, simultaneous suits in state and federal court. It has produced inconsistent outcomes on the merits. And it has opened the door to the very ills—"the targeting of deep pocket defendants . . . without regard to their actual culpability," and "the abuse of the discovery process" that imposes massive costs and forces settlement—that Congress sought to eliminate when it enacted its reforms. H.R. Conf. Rep. No. 104-369, at 31-32 (1995).

Indeed, because of the mistaken interpretation advanced by Respondents, the volume of state court Securities Act class actions has increased dramatically despite SLUSA. In just the past six years, at least 50 issuers were sued in Securities Act class actions in California state courts alone. Such cases cannot be centralized by the Judicial Panel on Multidistrict Litigation and instead must be litigated separately. That imposes significant additional costs on the newly public companies typically named as defendants in these cases (who also typically must indemnify the underwriters of their offerings that are named as defendants). The multi-pronged litigation also creates the potential for conflicts with federal decisions involving substantially identical allegations.

The risk of inconsistent outcomes is not just theoretical. In two recent instances, issuer defendants were sued in both state and federal court in class actions alleging violations of the federal securities laws. Although the complaints challenged the same allegedly false or misleading statements, the federal courts dismissed the claims *with prejudice* while the state courts allowed the claims to proceed. These divergent results stem from differing judicial philosophies, and sometimes different pleading standards. State courts—and particularly California courts, where most state court Securities Act class actions have been brought—often permit the pleading of conclusory "ultimate facts" and decline to apply the plausibility standards announced by this Court in *Twombly* and *Iqbal*. Indeed, state courts have repeatedly refused to dismiss Securities Act complaints no matter how improbable the allegations may be. As a result, complaints that would be dismissed in federal court regularly survive dismissal in state court.

Just as important, state courts regularly refuse to recognize the automatic discovery stay imposed by the PSLRA. Indeed, many California courts have explicitly invited plaintiffs to take discovery while a demurrer (the California state court equivalent of a motion to dismiss) is pending. Moreover, in those rare instances where California state courts have held that plaintiffs failed to state a claim, they have frequently encouraged plaintiffs to take discovery so that they can beef up their otherwise deficient allegations before filing an amended complaint. Thus, unlike the federal system, California state courts have allowed plaintiffs to discover their way into an arguably colorable claim. These practices are contrary to the PSLRA's goal of eliminating fishing expedition discovery. And they impose the extraordinary expense of discovery on issuers facing baseless claims.

These results are precisely what Congress sought to avoid when it provided for the application of uniform, national rules for Securities Act claims. For these reasons, and those set forth in Petitioners' brief, the judgment of the California Court of Appeal should be reversed.

ARGUMENT

I. CONGRESS PASSED THE PSLRA AND SLUSA AS A CHECK AGAINST ABUSIVE SECURITIES STRIKE SUITS AND TO PROMOTE UNIFORM AND CONSISTENT ENFORCEMENT OF THE FEDERAL SECURITIES LAWS

Congress passed the PSLRA to curb perceived "abuse[s]" in private securities litigation that were injuring "the entire U.S. economy." H.R. Conf. Rep. No. 104-369,

at 31-32 (1995). The House Conference Report highlighted nuisance filings, "the targeting of deep pocket defendants . . . without regard to their actual culpability," and "abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle." *Id.* at 31. The PSLRA enacted both substantive and procedural controls on the litigation of cases brought under the federal securities laws. These included a mandatory stay of discovery pending a motion to dismiss, 15 U.S.C. § 77z-1(b)(1), and a requirement that plaintiffs file certifications setting forth their transactions in the security at issue during the class period. *Id.* § 77z-1(a)(2).

SLUSA was passed three years after the PSLRA. As Petitioners explain, SLUSA accomplished three things. First, it prohibited plaintiffs from bringing class actions under state securities laws by precluding those actions altogether. *Id.* § 77p(b); *see also id.* § 77p(c). Second, it provided that "mixed" class actions alleging claims under both the Securities Act and state law would be litigated in federal court by allowing such actions, if brought in state court, to be removed to federal court, where the state claims would be dismissed and the federal claims adjudicated. *Id.* §§ 77p(c), 77v(a). And third, it ensured that class actions alleging claims only under the Securities Act would be litigated in federal court by eliminating state court jurisdiction over such actions. *Id.* § 77v(a). SLUSA made these changes to "enact national standards for securities class action lawsuits involving nationally traded securities." Pub. L. No. 105-353, § 2(5), 112 Stat 3227, 3227; *see also* H.R. Conf. Rep. No. 105-803, at 13 (1998) ("[T]his legislation establishes uniform national rules for securities class action litigation involving our national capital markets."). To this end, SLUSA "***make[s]***

Federal court the exclusive venue for most securities fraud class action litigation." H.R Conf. Rep. No. 105-803, at 15 (1998) (emphasis added). "***The purpose of this title is to prevent plaintiffs from seeking to evade the protections that Federal law provides against abusive litigation by filing suit in State, rather than in Federal, court.***" *Id.* at 13 (emphasis added).

Congress's stated goal could hardly have been clearer. Unfortunately, that goal has been thoroughly frustrated as some courts have misinterpreted SLUSA to allow Securities Act class actions filed in state court to remain in state court. The result has been a significant increase in state court Securities Act class actions and an increasing divergence of both practices and outcomes between state and federal Securities Act class actions.

II. PLAINTIFFS HAVE FLOCKED TO STATE COURTS TO LITIGATE PUTATIVE SECURITIES ACT CLASS ACTIONS

At a time when most complex class action litigation is being litigated in federal courts, Plaintiffs are filing state court class actions asserting exclusively Securities Act claims with increasing frequency. Most of these suits are being filed in the state courts of California. Indeed, since the California Court of Appeal held in *Luther v. Countrywide Financial Corp.*, 195 Cal. App. 4th 789 (2011), that state courts have jurisdiction over Securities Act class actions despite SLUSA, at least 50 securities issuers have been named as defendants in Securities Act class action suits in California state courts. *See* Appendix

A.[2] By contrast, only six issuers were sued in Securities Act class actions in California state courts in the entire decade preceding *Luther*. *See* Br. of the Securities Industry and Financial Markets Association, et al. as *Amici Curiae* in Supp. of the Pet. for Writ of Cert. at 7.[3]

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2. Plaintiffs have also filed Securities Act class action suits against issuers in other state courts. *See, e.g.*, *Bucks Cty. Emps. Ret. Fund v. Ally Fin. Inc.*, No. 16-013616-CZ (Mich. Cir. Ct. filed Oct. 21, 2016); *Pub. Emps.' Ret. Sys. of Miss. v. Endo Int'l plc*, No. 2017-02081-MJ (Pa. Ct. Com. Pl. filed Feb. 28, 2017) (removed to E.D. Pa., No. 17-1466, and remanded on Aug. 28, 2017); *City of Birmingham Ret. & Relief Sys. v. ZTO Express (Cayman) Inc.*, No. 01-CV-2017-902004.00 (Ala. Cir. Ct. filed May 16, 2017) (removed to N.D. Ala., No. 2:17-CV-1091-RDP, and stayed pending *Cyan*). No doubt litigation of Securities Act claims in state courts outside of California would be even more prevalent had many federal district courts outside of California not determined that Securities Act claims are removable. *See, e.g.*, *Schwartz v. Concordia Int'l Corp.*, No. 16-CV-6576 (NGG) (CLP), 2017 WL 2559777, at *8 (E.D.N.Y. June 12, 2017); *Hung v. iDreamSky Tech. Ltd.*, No. 15-CV-2514 (JPO), 2016 WL 299034, at *4 (S.D.N.Y. Jan. 25, 2016); *Gaynor v. Miller*, 205 F. Supp. 3d 935, 945-46 (E.D. Tenn. 2016).

3. More than 50% of these California state court actions were filed in the Superior Court for the County of San Mateo, which has become a magnet jurisdiction, with non-resident plaintiffs filing lawsuits to take advantage of what they deem to be a favorable venue. *See, e.g.*, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. filed Oct. 5, 2015) (lawsuit against ecommerce company with principal operations in China); *In re Etsy, Inc. S'holder Litig.*, No. CIV534768 (Cal. Super. Ct. San Mateo Cty. filed July 21, 2015) (lawsuit against Brooklyn-based ecommerce company with no San Mateo operations); *Guo v. ZTO Express (Cayman) Inc.*, No. 17-CIV-03676 (Cal. Super. Ct. San Mateo Cty. filed Aug. 11, 2017) (lawsuit against China-based logistics company); *Iuso v. Snap, Inc.*, No. 17-CIV-03710 (Cal. Super. Ct. San Mateo Cty. filed Aug. 14, 2017) (lawsuit against Los Angeles-based social networking company with no San Mateo operations).

This dramatic growth in state court Securities Act litigation has left many issuers subject to competing, multi-forum litigation arising from nearly identical challenges to the same statements in public offering materials. Since 2011, at least half of the 50 issuers sued in Securities Act class actions in California state court have also faced contemporaneous securities fraud lawsuits in federal district courts. *See* Appendix A. These federal suits include not only parallel lawsuits under the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* ("Exchange Act"), which cannot be maintained in state court, but also parallel Securities Act lawsuits that challenge the same alleged misrepresentations being challenged in state court under the same federal statute. For example:

- ***Alibaba*** was sued in an Exchange Act class action in the Southern District of New York and a Securities Act class action in California Superior Court (San Mateo County);[4]

- ***Sunrun*** was sued in a Securities Act class action in the Northern District of California and a Securities Act class action in California Superior Court (San Mateo County);[5]

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4. *Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd.*, No. 1:15-md-02631-CM (S.D.N.Y. filed June 24, 2015), appeal docketed, No. 16-2519 (2d Cir. July 20, 2016); *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. filed Oct. 5, 2015).

5. *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal. filed May 6, 2016); *In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. filed Apr. 13, 2016).

- ***Etsy*** was sued in a Securities Act and Exchange Act class action in the Eastern District of New York and a Securities Act class action in California Superior Court (San Mateo County);[6] and

- ***Snap*** was sued in two Securities Act and Exchange Act class actions in the Central District of California and three Securities Act class actions in California Superior Court (San Mateo and Los Angeles Counties).[7]

As discussed below, the proliferation of California state court Securities Act litigation can be explained only by the many differences in how state and federal courts handle such cases. These differences place issuer defendants in state court actions at a meaningful disadvantage and result in marked inconsistencies in outcomes in parallel state and federal court securities litigation.

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6. *Altayyar v. Etsy, Inc.*, No. 1:15-cv-02785-AMD-RER (E.D.N.Y. filed May 13, 2015), appeal docketed, No. 17-1180 (2d Cir. Apr. 21, 2017); *In re Etsy, Inc. S'holder Litig.*, No. CIV534768 (Cal. Super. Ct. San Mateo Cty. filed July 21, 2015).

7. *Erickson v. Snap Inc.*, No. 2:17-cv-03679-SVW-AGR (C.D. Cal. filed May 16, 2017); *Gupta v. Snap Inc.*, No. 2:17-cv-05054-SVW-AGR (C.D. Cal. filed July 10, 2017); *Inso v. Snap, Inc.*, No. 17-CIV-03710 (Cal. Super. Ct. San Mateo Cty. filed Aug. 14, 2017); *Hsieh v. Snap Inc.*, No. BC669394 (Cal. Super. Ct. Los Angeles Cty. filed July 25, 2017); *Simpson v. Snap Inc.*, No. BC662444 (Cal. Super. Ct. Los Angeles Cty. filed May 23, 2017) (voluntarily dismissed following removal to C.D. Cal.).

III. RESPONDENTS' INTERPRETATION OF SLUSA HAS PRODUCED RAMPANT ABUSES AND INEFFICIENCIES IN THE LITIGATION OF SECURITIES ACT CLAIMS

A. State Court Actions Are Not Subject To Centralization By The Judicial Panel On Multidistrict Litigation, Thus Adding To Issuers' Burdens

Federal actions with "one or more common questions of fact" can be centralized in a single federal district. 28 U.S.C. § 1407(a). This procedure is aimed to advance the "just and efficient conduct" of actions. *Id.* The Judicial Panel on Multidistrict Litigation ("JPML") regularly holds that having a single judge preside over related actions has the effect of "providing consistency, preventing conflicting rulings, and greatly reducing the duplicative expenditure of judicial and party resources." *In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, MDL No. 2265, 2011 WL 11761004, at *1 (J.P.M.L. Dec. 21, 2011). Indeed, the JPML routinely consolidates federal securities litigation, including in cases involving Securities Act and Exchange Act claims. *See, e.g., In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 899 F. Supp. 2d 1374, 1375 (J.P.M.L. 2012).

The JPML is powerless, however, to act with respect to state court actions. Under Respondents' interpretation of SLUSA, therefore, there is no way to consolidate multiple federal and state court securities actions into a single court, even when they involve the exact same claims and allegations. That frustrates SLUSA's goal of streamlining litigation and preventing inconsistent rulings.

It also imposes substantial additional burdens on issuer defendants. Specifically, forcing companies to defend parallel state and federal class actions imposes massive litigation costs on the newly public companies that are typically named as defendants in cases under Section 11 of the Securities Act.[8] These burdens are particularly severe because issuers are almost always contractually bound to pay the attorneys' fees of the initial public offering ("IPO") underwriters that are typically named as co-defendants in Securities Act claims. Moreover, these indemnified underwriters' fees are generally not covered by director and officer insurance policies and must be borne by the issuers themselves.

B. The Pleading Standards Applied By Many State Courts Do Not Provide A Meaningful Check Against Frivolous Securities Act Litigation

Federal courts function as gatekeepers against baseless litigation and repeatedly reference this role in considering pleading challenges. *See, e.g., Palin v. New York Times Co.*, No. 17-CV-4853 (JSR), 2017 WL 3712177, at *1 n.1 (S.D.N.Y. Aug. 29, 2017) ("By requiring district courts to make plausibility determinations based on the pleadings, the Supreme Court has, in effect, made district courts gatekeepers.") (citing *Iqbal* and *Twombly*); *Pearson v. Vill. of Greenup, Ill.*, No. 09-CV-0699-MJR, 2009 WL

8. These burdens are further compounded in the case of foreign private issuers, who may face litigation in their home countries, in addition to both federal and state court suits. This exposure to parallel state and federal litigation places the U.S. capital markets at a competitive disadvantage and is yet another negative consequence of the frustration of SLUSA's goal of achieving uniform standards for securities litigation.

4789259, at *2 (S.D. Ill. Dec. 9, 2009) ("The Court has a role as a gatekeeper to prevent a plaintiff with a largely groundless claim from being allowed to take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.") (citing *Twombly*) (quotation marks omitted). Such a check is particularly appropriate in securities class action litigation, which this Court has recognized, "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

The federal courts' gatekeeper role is closely related to federal pleading standards. As this Court has held on multiple occasions starting with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), federal plaintiffs must state "a plausible claim for relief," and judges evaluating the pleadings must engage in "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Unless the pleading "nudge[s plaintiff's] claims across the line from conceivable to plausible," the complaint is subject to dismissal under Federal Rule of Civil Procedure 8. *Twombly*, 550 U.S. at 570. More recently, this Court explicitly held that *Iqbal* applies to Securities Act claims in federal court, and that meeting the pleading standard "is no small task for an investor." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1332 (2015).[9]

9. Although *Twombly* and *Iqbal* post-date the PSLRA and SLUSA, this Court's decision in *Omnicare* makes clear that the pleading standard set forth in those cases is consistent with SLUSA's

By contrast, state courts often view state pleading rules as laxer than federal rules and decline to exercise a gatekeeper function. In California, for example, plaintiffs typically argue that a complaint must contain only "[a] statement of the facts constituting the cause of action, in ordinary and concise language." Cal. Civ. Proc. Code § 425.10(a)(1). Many California state courts have suggested that the operative standard is "fair notice," which permits the pleading of "ultimate" facts, *i.e.*, "the facts constituting the cause of action"—rather than "evidentiary" facts, *i.e.*, details that support the general factual assertions being made. *Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exch.*, 132 Cal. App. 4th 1076, 1098-99 (2005); *see also McKell v. Wash. Mut., Inc.*, 142 Cal. App. 4th 1457, 1469 (2006) ("The rules of pleading require . . . only general allegations of ultimate fact. The plaintiff need not plead evidentiary facts supporting the allegation of ultimate fact.") (citations omitted); *Doe v. City of L.A.*, 42 Cal. 4th 531, 550 (2007); 49A Cal. Jur. 3d Pleading § 141 (2017) ("[A] complaint is not insufficient . . . because essential facts appear only inferentially, as conclusions of law, by way of recital, or as informal and argumentative allegations.") (footnotes omitted).

Moreover, in addition to accepting mere notice pleading, California state courts often reject the federal plausibility requirement and instead hold that "facts alleged in the pleading are deemed to be true, ***however***

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goal of effectuating the intent of the PSLRA and making federal courts gatekeepers for securities suits. *Id.* Moreover, regardless of when the plausibility requirement was articulated, it is now the law in federal courts but, as discussed below, is not applied by many state courts, thus resulting in a lack of uniformity in the evaluation of challenges to Securities Act pleadings.

improbable they may be." *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604 (1981) (emphasis added).[10] And several have explicitly declined to "examine the 'plausibility' of allegations on a demurrer pursuant to Code of Civil Procedure § 430.10 in the same way that federal courts may examine the 'plausibility' of allegations on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and *Iqbal*." *Lee v. Wells Fargo Bank N.A.*, No. 34-2013-00153873-CU-OR-GDS, 2014 WL 3732002, at *3 (Cal. Super. Ct. Sacramento Cty. July 25, 2014); *see also In re FireEye, Inc. Sec. Litig.*, No. 1-14-CV-266866, 2015 WL 13546104, at *12 & n.91 (Cal. Super. Ct. Santa Clara Cty. Aug. 11, 2015) (court "not inclined to apply the federal heightened pleading standards set forth in [*Twombly/Iqbal*]" and noting that "[t]here appear to be no published cases in California applying the *Twombly/Iqbal* pleading standards to a Section 11 or Section 12(a)(2) action filed in state court").[11]

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10. *See also, e.g.*, *Osborne v. Yasmeh*, No. B262043, 2016 WL 4039863, at *11 (Cal. Ct. App. July 28, 2016) ("[T]he facts alleged in the pleading are deemed to be true, however improbable they may be."); *Franceschi v. Franchise Tax Bd.*, 1 Cal. App. 5th 247, 256 (2016) (same); *Popescu v. Apple Inc.*, 1 Cal. App. 5th 39, 44 (2016) (same); *Nolte v. Cedars Sinai Med. Ctr.*, 236 Cal. App. 4th 1401, 1406 (2015) (same); *Bock v. Hansen*, 225 Cal. App. 4th 215, 220 (2014) (same); *Leyte-Vidal v. Semel*, 220 Cal. App. 4th 1001, 1007 (2013) (same); *Friends of Glendora v. City of Glendora*, 182 Cal. App. 4th 573, 576 (2010) (same); *Align Tech., Inc. v. Bao Tran*, 179 Cal. App. 4th 949, 958 (2009) (same).

11. Although *amici* provide the Court with examples of decisions in which state courts reject the plausibility standard or apply "loose" pleading standards, *amici* believe, and issuers regularly and rightfully argue, that state courts should apply greater scrutiny to Securities Act complaints, similar to the scrutiny applied

These pleading standards can be outcome determinative. While federal courts regularly dismiss baseless Securities Act class actions on the pleadings with prejudice, *amici* are unaware of any California court that has sustained an initital demurrer to a Securities Act class action without leave to amend. Indeed, multiple California trial courts in Securities Act class actions have highlighted what they consider to be "liberal" and "loose" pleading standards as a principal reason for overruling demurrers to Securities Act class action complaints:

- "The real primary analysis of the Court is, yes, the Court is interpreting Federal law, but the Court is bound by a much looser pleading standard under California law than . . . under the Federal Rules of Civil Procedure . . . . That's really the analysis of the Court. It's a much lesser burden. That's all." Rep.'s Tr. of Proceedings at 9:22-10:3, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 20 and 24, 2016) (overruling demurrer).

- "You have to do a liberal pleading, accept it all as true. . . . And you want me to be looking at [news] articles and then seeing, you know, what is the nature and substance of each and how they compare [to the allegedly omitted information]. And that's just not in a state court pleading procedure . . . ." Hr'g Tr. at 14:8-9, 11-14, *Hosey*

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by federal courts. *Amici*, who are at different stages in their various state court proceedings, do not intend, through this submission, to waive any such arguments or to make any concessions or admissions with respect to their individual circumstances or cases.

v. Costolo, No. 16-CIV-02228 (Cal. Super. Ct. San Mateo Cty. Mar. 17, 2017) (overruling demurrer).

- Overruling demurrer based on "ultimate factual allegation" deemed sufficient "for purposes of California pleading standards." Order on Dem. at 5-6, *Robinson v. Audience, Inc.*, No. 1-12-CV-232227 (Cal. Super. Ct. Santa Clara Cty. Sept. 3, 2013); *see also* Order re: Dem. at 8, *In re MobileIron, Inc. S'holder Litig.*, No. 1-15-CV-284001 (Cal. Super. Ct. Santa Clara Cty. Oct. 4, 2016) (same).[12]

These differences have led to inconsistent outcomes on dispositive motions, even in cases where plaintiffs in federal and state court are challenging precisely the same alleged misrepresentations in offering documents.

One example of this phenomenon involves Alibaba, the world's largest ecommerce company, which runs online marketplaces similar to Amazon Marketplace and

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12. As one commentator recognized, "a defendant to a weak claim may stand a chance of disposing of the lawsuit with a motion to dismiss under the *Twombly/Iqbal* standard . . . . Faced with the same circumstances in a California state court, however, a defendant . . . would have to accept the complaint's allegations at face value without applying a plausibility standard." Elizabeth M. Weldon & Sean J. O'Hara, *Litigating in California State Court but Not a Local?*, Mar. 25, 2013, https://www.swlaw.com/assets/pdf/publications/2013/03/25/Litigating%20in%20California%20State%20Court%20Part%201.pdf; *see also* Eric E. Younger, *Younger on California Motions* § 6:26 (2d ed. 2016) ("An argument (even if true) that [a] plaintiff will never be able to prove a claim is simply a waste of time in a demurrer.").

eBay. Alibaba conducted its IPO in September 2014. In January 2015, a document purported to memorialize a meeting between Alibaba and Chinese regulators that took place several months before Alibaba's IPO, during which the regulators allegedly spoke critically of Alibaba's response to the sale of counterfeit goods by third-party merchants on its ecommerce platforms. Alibaba's stock price dropped following the initial posting of this document but continued to trade at approximately 50% above its IPO price. Seven Exchange Act securities fraud lawsuits were filed in federal district courts around the country and were thereafter centralized by the Judicial Panel on Multidistrict Litigation before Chief Judge Colleen McMahon in the Southern District of New York. *Christine Asia Co., Ltd. v. Alibaba Grp. Holding Ltd.*, 192 F. Supp. 3d 456 (S.D.N.Y. 2016) (the "Alibaba Federal Litigation"). Seven months later, and coinciding with a global stock market decline, Alibaba's stock price dropped below its IPO price for the first time. Three Securities Act lawsuits were then filed in California Superior Court (San Mateo County) challenging allegedly false and misleading statements in Alibaba's IPO registration statement (the "Alibaba California Litigation"). Plaintiffs relied on the same document on which plaintiffs in the Alibaba Federal Litigation relied. These lawsuits could not be consolidated with the pending federal actions because they were filed in state court.[13]

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13. Alibaba had removed the state court action, but it was remanded, and the California Superior Court subsequently rejected Alibaba's argument that it lacked subject matter jurisdiction to hear the Securities Act claims. The parties engaged in approximately six months of discovery in California before Alibaba's demurrer was even considered.

The allegations asserted in the Alibaba Federal Litigation and the Alibaba California Litigation had, in the words of the state court judge, an "extraordinary degree of factual overlap." Tentative Order at 14, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 17, 2016, incorporated by reference in final order Dec. 22, 2016). Indeed, both actions asserted the same alleged misrepresentations and omissions. *See* Appendix B. The only distinctions of any significance between the two actions were (1) the federal securities statute under which plaintiffs claimed violations, and (2) the court in which they were filed.

The outcome of Alibaba's challenges to the pleadings was not similar, however. In the Alibaba Federal Litigation, Chief Judge McMahon of the Southern District of New York granted Alibaba's motion to dismiss with prejudice after finding that Alibaba's IPO registration statement was neither false nor misleading. *Christine Asia*, 192 F. Supp. 3d at 482. In reaching this decision, the court reviewed Alibaba's IPO disclosures and concluded that the registration statement was "unusually comprehensive," "accurate and sufficiently candid" and "fully disclose[d] all substantive investment risks." *Id.* at 459, 469, 477. The decision was not based on a lack of particularity or specificity in the pleadings and did not require application of Federal Rule of Civil Procedure 9(b) or heightened PSLRA pleading standards. Instead, the federal court concluded that even if the allegations were accepted as true, the challenged statements were either not "materially misleading and actionable" or were "too general to be considered false or misleading." *Id.* at 478. Finally, Chief Judge McMahon concluded that "Defendants were under no duty to disclose" Alibaba's

meeting with Chinese regulators. *Id.* at 482. Significantly, the court determined that plaintiffs' failure to plead actionable false statements was "'substantive' rather than the result of an 'inadequately or inartfully pleaded' complaint." *Id.* Thus, the court dismissed the Alibaba Federal Litigation with prejudice.

By contrast, the court in the Alibaba California Litigation declined to adopt the federal court's reasoning based on perceived differences in state and federal pleading standards and thus overruled Alibaba's demurrer. Plaintiffs had opposed Alibaba's demurrer by arguing that the "Federal rules of pleading differ from the rules of pleading in California state courts," specifically including *Iqbal* among pleading rules that were inapplicable in state court. Plaintiffs further contended that under "normal California pleading requirements," their complaint must be "liberally construed," and Alibaba's demurrer must be overruled "so long as [the complaint] apprises the defendant of the factual basis for the claim." Pls.' Suppl. Submission in Opp. to Defs.' Dem. re Order Entered in the Fed. Sec. Fraud Action at 2-3, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. July 15, 2016). The San Mateo Superior Court accepted Plaintiffs' argument and overruled Alibaba's demurrer on the basis of the state court's more liberal pleading standard:

> The Court agrees with Defendants that given the extraordinary degree of factual overlap between this case and [the Alibaba Federal Litigation] it is important to address the reasoning for the Court's decision. However, it is also important to keep in mind that the Court

> in [the Alibaba Federal Litigation] viewed the adequacy of the allegations pursuant to a much stricter federal pleading standard.

Tentative Order at 14, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 17, 2016, incorporated by reference in final order Dec. 22, 2016). The Court decided that "[t]he pleading standards in federal and state court are different, and this distinction affects the Court's analysis of Defendants' demurrer" and that "[u]nder state pleading standards Plaintiffs' Complaint must be liberally construed." *Id.* at 6, 15 (quotation marks omitted). Notwithstanding the fact that Chief Judge McMahon's ruling was premised on the legal question of whether, even accepting plaintiff's allegations as true, Alibaba's risk disclosures were misleading, the Superior Court's "primary analysis" was based on the perceived difference in federal and "much looser" state pleading standards. Rep.'s Tr. of Proceedings at 9:22-10:1, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 20 and 24, 2016). Moreover, with respect to Alibaba's argument that its disclosures were sufficient to warn investors of the allegedly concealed risks, the Superior Court held that this question, which the federal court had resolved in connection with the motion to dismiss, "cannot be resolved by demurrer." Tentative Order at 16, *Buelow v. Alibaba Grp. Holding Ltd.*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty. Oct. 17, 2016, incorporated by reference in final order Dec. 22, 2016).

If a consistent pleading standard had been applied, the Superior Court should have dismissed the Alibaba California Litigation with prejudice just as Chief Judge McMahon had dismissed the Alibaba Federal Litigation

with prejudice. Instead, the state court's perceived stark difference between the state and federal pleading standards led it to allow the case to continue with merits discovery even though the relevant factual allegations and legal standards for falsity were identical in the two actions.[14]

C. Inconsistent Outcomes In Securities Class Actions Litigated In Both State And Federal Courts Are Not Only A Result Of Perceived Differences In Pleading Standards

Federal and state courts considering virtually identical challenges to registration statements have reached conflicting decisions even in cases that have not turned on pleading standards. Such was the case for Sunrun, a San Francisco-based residential solar power company. It conducted its IPO on NASDAQ in August 2015. Before the company's IPO, a public utility had submitted a proposal

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14. Federal and California courts have also applied different summary judgment standards. In federal court, "a moving defendant may shift the burden of producing evidence to the nonmoving plaintiff merely by 'showing'– that is, pointing out through argument— the absence of evidence to support plaintiff's claim." *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532 (9th Cir. 2000). By contrast, many California courts permit burden shifting only after the moving party presents ***evidence***—rather than just ***argument***—that the nonmoving plaintiff cannot meet its burden. *See Aguilar v. Atl. Richfield Co.*, 25 Cal. 4th 826, 854-55, as modified (July 11, 2001) (rejecting federal standard); *Fairbank*, 212 F.3d at 532 (contrasting federal and California standards). This high burden diminishes the availability of summary judgment as a tool to resolve Securities Act claims in California court on important issues, such as the existence of a false or misleading statement, and provides yet another reason why limiting Securities Act class actions to federal court is the only way to effectuate Congressional intent.

to the Nevada Public Utility Commission ("Nevada PUC") to limit net metering policies, on which Sunrun relied to sell solar panels in Nevada. In the Company's registration statement, Sunrun stated that it focuses on "favorable policy environments" with net metering programs. Sunrun warned investors that the "expiration, elimination or reduction of . . . rebates and incentives could adversely impact" its business and specifically disclosed that "changes to net metering policies may significantly reduce demand for electricity from our solar service offerings" and that utility companies and other special interests were "currently challenging solar-related policies to reduce the competitiveness of residential solar energy." In January 2016, Sunrun announced that it was withdrawing from the Nevada solar power market because the Nevada PUC had cut certain net metering policies. A Securities Act class action was filed in California Superior Court in April 2016. *See In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. filed Apr. 13, 2016) (the "Sunrun California Litigation"). In May 2016, a parallel Securities Act lawsuit was filed in the Northern District of California. *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal. filed May 6, 2016) (the "Sunrun Federal Litigation").

The allegations in the Sunrun Federal Litigation and the Sunrun California Litigation are virtually identical. Both cases assert the same legal claims (violations of Sections 11, 12(a)(2) and 15 of the Securities Act), challenge the same registration statement and prospectus, and premise their claims on the same factual circumstances. *See* Appendix C (comparison of allegations). The only material difference between the two actions is the court in which they were filed. However, yet again, these two nearly identical cases produced diametrically opposite outcomes.

In the Sunrun Federal Litigation, Judge Charles Breyer of the Northern District of California granted Sunrun's motion to dismiss with prejudice. His decision carefully analyzed Sunrun's IPO disclosures, including Sunrun's regulatory risk factors, and concluded that plaintiffs had not sufficiently pleaded falsity. For example, Judge Breyer explained that the company's statement that it entered "favorable policy environments" was not false, "as the company's exit from Nevada made painfully clear." *Greenberg v. Sunrun Inc.*, 233 F. Supp. 3d 764, 772 (N.D. Cal. 2017). Additionally, Judge Breyer explained that plaintiff's allegation that Sunrun "sugarcoated" its Nevada regulatory risks was "a mirage" because Sunrun's disclosures adequately warned that regulatory developments could adversely affect its business. *Id.* at 773. The court dismissed the complaint with prejudice, concluding that "leave to amend would be futile. The Prospectus, after all, says what it says." *Id.* at 775.

By contrast, in the Sunrun California Litigation, the San Mateo Superior Court overruled Sunrun's demurrer and allowed the case to proceed to discovery without explicitly analyzing Sunrun's IPO disclosures. Case Mgmt. Order #2 at 3-4, *In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. Jan. 17, 2017). Instead, the Superior Court simply concluded that plaintiffs had "adequately pleaded" the claim. *Id.* It also noted that it would not engage in the legal analysis performed by the federal court to consider whether the registration statement was false or misleading in light of its disclosures and publicly available information:

> Although Defendants strongly argue that the statements were not false and misleading, and

> asked the Court to make that determination by interpretation of the Nevada legislation discussed in the Complaint, such an inquiry is more appropriate on [a summary judgment] motion not demurrer here.

Id. at 3. Thus, the state and federal courts considering identical claims against Sunrun engaged in a starkly different level of analysis and reached diametrically opposed outcomes.

Sunrun is far from the only issuer that faces the potential for conflicting outcomes in Securities Act litigation. For example, earlier this year, three plaintiffs filed nearly identical Securities Act suits in San Mateo Superior Court related to the IPO of Avinger, Inc., a medical device company. *See Olberding v. Avinger, Inc.*, No. 17-CIV-02307 (Cal. Super. Ct. San Mateo Cty. filed May 25, 2017); *Gonzalez v. Avinger, Inc.*, No. 17-CIV-02284 (Cal. Super. Ct. San Mateo Cty. filed May 23, 2017); *Grotewiel v. Avinger, Inc.*, No. 17-CIV-02240 (Cal. Super. Ct. San Mateo Cty. filed May 22, 2017). In all three cases, the defendants removed to the U.S. District Court for the Northern District of California. Two of the plaintiffs moved to remand, which motions were granted based on the federal court's interpretation of the Securities Act's anti-removal bar. Order Granting Mots. to Remand, *Olberding v. Avinger, Inc.*, Nos. 4:17-cv-03398-CW, 4:17-cv-03401-CW (N.D. Cal. July 21, 2017). Because the third plaintiff did not seek remand, however, one case continues to move forward in federal court. *Grotewiel v. Avinger, Inc.*, No. 4:17-cv-03400-CW (N.D. Cal. filed June 12, 2017). Thus, Avinger faces a meaningful possibility of divergent future outcomes. As set forth in Appendix A,

other issuers face a similar risk based on parallel securities class action litigation proceeding simultaneously in state and federal courts.

D. Liberal State Court Discovery Practices Impose Significant And Asymmetrical Costs On Issuers From The Outset Of State Court Securities Class Action Litigation

Past the pleading stage, state courts continue to handle Securities Act cases differently than their federal counterparts, allowing discovery to proceed where federal courts do not. These discovery costs exponentially increase the cost of litigation. Victor Marrero, *The Cost of Rules, The Rule of Costs*, 37 Cardozo L.J. 1599, 1656-57 (2016) ("[D]iscovery is unmatched among the major sources of litigation costs; it generates more legal fees and expenses than any other round of court proceedings. According to various estimates, discovery can consume from fifty to as much as ninety percent of total legal costs in some cases."); *see* Lawyers for Civil Justice et al., *Litigation Cost Survey of Major Companies* 5 (2010).

In securities litigation, the financial burden of discovery is "asymmetric" because, "[w]hile plaintiffs incur minimal costs, defendants are required to produce numerous records and deponents, making the process extremely 'expensive and time-consuming.'" Laura A. McDonald, *Restoring the Balance After the Private Securities Litigation Reform Act of 1995*, 38 Fla. St. U. L.J. 911, 916 (2011) (footnotes omitted). Moreover, as stated above, the burdens on issuer defendants in Securities Act cases are particularly acute because they must normally pay the underwriter defendants' defense costs, including the cost of the underwriters' discovery efforts.

In an effort to shield issuers from the high cost of discovery in weak or frivolous securities class action litigation, the PSLRA provides that in private securities actions filed in federal court, "all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss." 15 U.S.C. § 77z-1(b)(1). By conditioning access to discovery on a plaintiff's ability to plead past a motion to dismiss, Congress affirmed its intent that the motion to dismiss phase be a meaningful hurdle. The mandatory discovery stay was motivated by concern that plaintiffs were "targeting [] deep-pocket defendants" and making "vexatious discovery requests" to develop inchoate or insufficient claims or to extract settlements from defendants who would find it less expensive to settle than to pay the high cost of discovery. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 163 (2008) ("[E]xtensive discovery ... allows plaintiffs with weak claims to extort settlements from innocent companies."); H.R. Conf. Rep. No. 104-369, at 31 (1995) ("[A]busive practices committed in private securities litigation include ... the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle.").

The PSLRA discovery stay reflected Congressional intent that plaintiffs should not be allowed to use discovery as a way to manufacture an arguably colorable securities claim after filing a deficient complaint. Congress recognized that plaintiffs had been filing abusive "lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might

lead eventually to some plausible cause of action." H.R. Conf. Rep. No. 104-369, at 31 (1995). And in enacting the PSLRA, "Congress clearly intended that complaints in these securities actions should stand or fall based on the actual knowledge of the plaintiffs rather than information produced by the defendants after the action has been filed." *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 966 (9th Cir. 2014) (quotation marks omitted); *Newby v. Enron Corp.*, 338 F.3d 467, 471 (5th Cir. 2003) ("The stay protected defendants from plaintiffs who would use discovery to substantiate an initially frivolous complaint.") (citing H.R. Conf. Rep. No. 104-369, at 31, 32 (1995)).

Here again, the interpretation advanced by Respondents has turned this clear Congressional command on its head. Unfortunately for defendants in Securities Act class actions filed in California state court, California courts frequently do not enforce the PSLRA discovery stay. *See, e.g.*, Order Denying Defs.' Mot. to Stay Proceedings at 9-13, *In re Pac. Biosciences of Cal., Inc. Sec. Litig.*, No. CIV509210 (Cal. Super. Ct. San Mateo Cty. May 25, 2012) (calling defendants' argument that PSLRA applied to action "creative" but "not persuasive" because "it is only a discovery stay of federal securities class actions filed in federal court"); *Small v. Fritz Cos.*, 30 Cal. 4th 167, 178 (2003) (holding that "the PSLRA governs only actions in federal court" and "do[es] not affect state court [] actions"). Instead, California has long "liberally construed [its procedures] in favor of discovery." *Greyhound Corp. v. Superior Court*, 56 Cal. 2d 355, 383 (1961), *superseded by statute on other grounds*, Stats. 1963, ch. 1744, § 1, p. 3477-79, as recognized by *Coito v. Superior Court*, 54 Cal. 4th 480 (2012). Indeed, California

provides for far broader discovery compared to the federal rules' new "proportionality" standard. *See* Beverly Reid O'Connell & Karen L. Stevenson, *Rutter Group Practice Guide: Federal Civil Procedure Before Trial, Cal. & 9th Cir. Eds.* ¶ 11:610 (2017). Although California courts have discretion to grant stays where justice permits, stays during the pendency of motions challenging pleadings tend to be the exception rather than the rule. It is thus common for discovery to commence in securities cases before demurrers are even briefed, let alone decided. *See In re Sunrun Inc. S'holder Litig.*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty. filed Apr. 13, 2016) (commencing discovery before demurrers resolved); *In re Pac. Biosciences of Cal., Inc. Sec. Litig.*, No. CIV509210 (Cal. Super. Ct. San Mateo Cty. filed Oct. 21, 2011) (same); *In re Avalanche Biotechnologies, Inc. S'holder Litig.*, No. CIV536488 (Cal. Super. Ct. San Mateo Cty. filed Dec. 7, 2015) (same); *Plymouth Cty. Ret. Sys. v. Model N Inc.*, No. CIV530291 (Cal. Super. Ct. San Mateo Cty. filed Sept. 5, 2014) (same); *Wiley v. Envivio, Inc.*, No. CIV517185 (Cal. Super. Ct. San Mateo Cty. filed Oct. 5, 2012) (same); *In re CafePress Inc. S'holder Litig.*, No. CIV522744 (Cal. Super. Ct. San Mateo Cty. filed July 10, 2013) (same).

Moreover, California courts often hold that pleading deficiencies do not affect the right to take discovery. *See, e.g., Mattco Forge, Inc. v. Arthur Young & Co.*, 223 Cal. App. 3d 1429, 1436 n.3 (1990). Accordingly, California courts frequently permit (and even encourage) plaintiffs to take discovery even after a demurrer has been sustained with leave to replead. As one Superior Court succinctly put it:

> California law is clear. [Plaintiffs] have the opportunity to take discovery, to amend their complaint. And the fact that a demurrer has been sustained with leave to amend, if anything, bolsters their right to discovery, not negates it.

Rep.'s Tr. of Proceedings at 58:18-22, *Geller v. LendingClub Corp.*, No. CIV537300 (Cal. Super. Ct. San Mateo Cty. Sept. 30, 2016) (sustaining demurrer in part and ordering further discovery); *see also* Hr'g Tr. at 28:1-2, *In re Castlight Health Inc. S'holder Litig.*, No. CIV533203 (Cal. Super. Ct. San Mateo Cty. Jan. 27, 2016) ("There's no stay on discovery. Do whatever you need."); Hr'g Tr. at 49:18-19, *Hosey v. Costolo*, No. 16-CIV-02228 (Cal. Super. Ct. San Mateo Cty. Mar. 17, 2017) (setting deadline for amended pleading after sustaining demurrer as to Section 15 claim so that plaintiffs would have "enough time to propound" discovery as to that claim); Rep.'s Tr. of Proceedings at 4:16-19, *Giavara v. GoPro, Inc.*, No. CIV537077 (Cal. Super. Ct. San Mateo Cty. Nov. 22, 2016) (defense counsel noting that plaintiffs had "receiv[ed] tens of thousands of pages in extensive discovery" before making second attempt to plead claims).

These discovery practices provide yet another stark contrast to the system of checks and balances that Congress created through the PSLRA and SLUSA. Allowing Securities Act class actions to proceed to early merits discovery in state court further frustrates Congress's intent of encouraging uniform and consistent enforcement of the federal securities laws. This practice also undermines Congress's goal of discouraging frivolous securities litigation. To the contrary, by permitting, and even encouraging, fishing expedition discovery,

state courts allow plaintiffs to "discover their way" into arguably colorable claims despite lacking a valid initial cause of action.[15]

CONCLUSION

In short, the interpretation of SLUSA advanced by Respondents imposes on issuers the very burdens and disadvantages that Congress sought to eliminate when it enacted the PSLRA and SLUSA. These disadvantages lead, in turn, to the "extortionate settlements" that the PSLRA and SLUSA sought to stem. *Dabit*, 547 U.S. at 81. By properly construing SLUSA as eliminating state court jurisdiction for Securities Act class actions, this Court has the ability to eliminate this jurisdiction-based outcome disparity. *Amici* respectfully suggest that the Court avail itself of this opportunity to return all Securities Act class action litigation to the level federal playing field that Congress mandated. The judgment below should be reversed.

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15. The PSLRA's requirement that securities plaintiffs file certifications setting forth their transactions in the security at issue, 15 U.S.C. § 77z-1(a)(2), further protects federal court defendants but not state court defendants. In *In re Zynga Inc. Securities Litigation*, defendants in a lawsuit filed in federal court were able to determine based on the plaintiff's PSLRA certification, which set forth plaintiff's stock purchase dates, that the plaintiff lacked standing to pursue Securities Act claims. The federal court granted their motion to dismiss on this basis. No. C 12-04007 JSW, 2014 U.S. Dist. LEXIS 24673, at *9-11 (N.D. Cal. Feb. 25, 2014). By contrast, in *Reyes v. Zynga Inc.*, which was filed in state court, because the plaintiff was not required to file a PSLRA certification, defendants could not determine whether the plaintiff lacked standing until shortly before the case was dismissed, after more than two years of litigation. *See* Order Granting Pl. Robert Reyes' Unopposed Req. for Voluntary Dismissal of Action, *Reyes v. Zynga Inc.*, No. CGC-12-522876 (Cal. Super. Ct. San Francisco Cty. Feb. 11, 2015).

Respectfully submitted,

JONATHAN K. YOUNGWOOD
SIMPSON THACHER
& BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000

JAMES G. KREISSMAN
Counsel of Record
SIMONA G. STRAUSS
STEPHEN P. BLAKE
ELIZABETH H. WHITE
SIMPSON THACHER
& BARTLETT LLP
2475 Hanover Street
Palo Alto, CA 94304
(650) 251-5000
jkreissman@stblaw.com

Counsel for Amici Curiae

September 5, 2017

APPENDIX

APPENDIX A — LITIGATION AGAINST ISSUERS IN CALIFORNIA STATE COURT

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
A10 Networks	Santa Clara	1-15-CV-276207	
Aerohive Networks	San Mateo	CIV534070	
Alibaba	San Mateo	CIV535692	Exchange Act (S.D.N.Y.)
Apigee	San Mateo	CIV537817 17-CIV-02788	
Atmel	Santa Clara	1-15-CV-286958	
Audience	Santa Clara	1-12-CV-232227	
Avalanche Biotechnologies	San Mateo	CIV536488	Securities Act and Exchange Act (N.D. Cal.)
Avinger	San Mateo	17-CIV-02284	Securities Act (N.D. Cal.)[2]
CafePress	San Mateo	CIV522744	

1. Removed to the Northern District of California and no motion to remand was filed. Two other removed actions had been remanded following plaintiffs' motions.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
Castlight Health	San Mateo	CIV533203	
Clovis Oncology	San Mateo	CIV537068	Exchange Act (D. Colo.)
Code Rebel	Los Angeles	BC624918	Exchange Act (S.D.N.Y.)
Coupons.com	Santa Clara	1-15-CV-278399	
Cyan	San Francisco	CGC-14-538355	
CytRx	Los Angeles	BC541426	Securities Act and Exchange Act (C.D. Cal.)
Envivio	San Mateo	CIV517185	Securities Act (N.D. Cal.)
Etsy	San Mateo	CIV534768	Securities Act and Exchange Act (E.D.N.Y.)
Facebook[3]	San Mateo	CIV514065	
FireEye	Santa Clara	1-14-CV-266866	Exchange Act (N.D. Cal.)

2. Removed and centralized by JPML in Southern District of New York before remand motion was decided.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
Fitbit	San Francisco	CGC-16-552062	Securities Act and Exchange Act (N.D. Cal.)
GoPro	San Mateo	CIV537077	
Kitov Pharmaceuticals	San Mateo	17-CIV-00620	Exchange Act (S.D.N.Y.)
LendingClub Corporation	San Mateo	CIV537300	Securities Act and Exchange Act (N.D. Cal.)
MobileIron	Santa Clara	1-15-CV-284001	
Model N	San Mateo	CIV530291	
NantKwest	Los Angeles	BC621292	
Natera	San Mateo	CIV537409	
NRG Yield	Kern	BCV-16-100867	
Ooma	San Mateo	CIV536959	
Pacific Biosciences of California	San Mateo	CIV509210	Securities Act and Exchange Act (N.D. Cal.)
Pacific Coast Oil Trust	Los Angeles	BC550418	

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
ProNAi Therapeutics	San Mateo	17-CIV-00595	Exchange Act (S.D.N.Y.)
Pure Storage	San Mateo	16-CIV-01183	
Revance Therapeutics	Santa Clara	1-15-CV-287794	
Sientra	San Mateo	CIV536013	Securities Act and Exchange Act (C.D. Cal.)
Smart Technologies	San Francisco	CGC-11-514673	Securities Act (S.D.N.Y.)
Snap	San Mateo[4] Los Angeles[5]	17-CIV-03710 BC669394	Securities Act and Exchange Act (C.D. Cal.)

3. Removed to the Northern District of California; pending motions to remand and to transfer venue to the Central District of California.

4. Removed to the Central District of California, related to the existing action in that district, then remanded *sua sponte*. A separate action in Los Angeles County Superior Court was removed to the Central District and voluntarily dismissed.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
STEC	Orange	30-2011-00489022	Securities Act and Exchange Act (C.D. Cal.)
SunEdison[6]	San Mateo	16-CIV-00884	Securities Act and Exchange Act (S.D.N.Y.)
Sunrun	San Mateo	CIV538215	Securities Act (N.D. Cal.)
TerraForm Global[7]	San Mateo	CIV535963	Securities Act (N.D. Cal.)
Tokai Pharmaceuticals	San Francisco	CGC-16-553796	Securities Act and Exchange Act (D. Mass.)
TrueCar[8]	Los Angeles	BC590999	

5. Removed under 28 U.S.C. § 1452 (related to bankruptcy proceedings).

6. Removed under 28 U.S.C. § 1452 (related to bankruptcy proceedings).

7. Removed and voluntarily dismissed with no remand motion filed.

Appendix A

ISSUER NAME	CALIFORNIA COUNTY	MASTER CASE NUMBER	PARALLEL FEDERAL CASE(S)
TrueChoice Solutions	San Diego	37-2017-23035-CU-FR-CTL	
Twitter	San Mateo	16-CIV-02228	
XBiotech	Los Angeles	BC602793	Exchange Act (W.D. Tex.)
Xoom	San Francisco	CGC-15-543531 CGC-15-544655	
ZELTIQ Aesthetics	Alameda	RG12621290	
ZTO Express	San Mateo	17-CIV-03676	Securities Act (N.D. Ala.[9] and S.D.N.Y.)
Zynga	San Francisco	CGC-12-522876	Exchange Act (N.D. Cal.)

8. Removed to the Northern District of Alabama from Alabama Circuit Court and stayed pending this Court's decision in *Cyan*.

APPENDIX B — ALIBABA STATE AND FEDERAL LITIGATION

Alibaba Comparison of Alleged Omissions and Misrepresentations

Challenged Statement/ Omission in California[1]	Challenged Statement/ Omission in S.D.N.Y.[2]
"[T]he Registration Statement failed to disclose that . . . on July 16, 2014, senior executives from Alibaba had met with senior Chinese government regulators and officials, who explained that Alibaba's e-commerce businesses were in serious violation of the laws and regulations of the People's Republic of China ('PRC')." (¶ 109)	"The Registration Statement . . . failed to disclose that . . . on July 16, 2014, senior executives from Alibaba had met with senior SAIC and AIC officials and were told that Alibaba's e-commerce businesses were in serious violation of PRC laws and regulations . . . ." (¶ 102)

1. Allegations taken from the Consolidated Complaint filed in *Buelow v. Alibaba Group Holding Limited*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty.) on March 25, 2016.

2. Allegations taken from the Consolidated Complaint filed in *In re Alibaba Group Holding Limited Securities Litigation* (also referred to as *Christine Asia Co., Ltd. v. Alibaba Group Holding Limited*), No. 1:15-md-02631-CM (S.D.N.Y.) on July 1, 2015.

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"The Registration Statement also failed to disclose that Chinese regulators and officials had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its e-commerce platforms . . . ." (¶ 110)	"The Registration Statement . . . failed to disclose . . . that SAIC had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its ecommerce platforms." (¶ 102)
"The Registration Statement also failed to disclose . . . that the SAIC had already commenced the 'Red Shield Web Sword' special program to clean up rampant abuses on e-commerce platforms, including counterfeiting and consumer fraud, with Alibaba as one of its main targets." (¶ 110)	"The Registration Statement also failed to disclose that the SAIC had commenced the 'Red Shield and Web Sword' special program to clean up rampant abuses in Alibaba's ecommerce platforms, including counterfeiting and consumer fraud, and that the SAIC considered Alibaba one of its main targets." (¶ 103)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"[T]he regulatory and legal system in China is complex and developing, and future regulations may impose additional requirements on our business." (¶ 111)	"[T]he regulatory and legal system in China is complex and developing, and future regulations may impose additional requirements on our business." (¶ 106)
"Maintaining the trusted status of our ecosystem is critical to our success, and any failure to do so could severely damage our reputation and brand, which would have a material adverse effect on our business, financial condition and results of operations." (¶ 111)	"Maintaining the trusted status of our ecosystem is critical to our success, and any failure to do so could severely damage our reputation and brand, which would have a material adverse effect on our business, financial condition and results of operations." (¶ 108)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
Alibaba's "ability to maintain our position as a trusted platform for online and mobile commerce is based in large part upon: . . . the quality and breadth of products and services offered by sellers through our marketplaces; [and] the strength of our consumer protection measures." (¶ 111)	"Alibaba's 'ability to maintain our position as a trusted platform for online and mobile commerce is based in large part upon: . . . the quality and breadth of products and services offered by sellers through our marketplaces; [and] the strength of our consumer protection measures.'" (¶ 110)
"We have received in the past, and we anticipate we will receive in the future, communications alleging that items offered or sold through our online marketplaces by third parties . . . infringe . . . intellectual property rights." (¶ 113)	"We have received in the past, and we anticipate we will receive in the future, communications alleging that items offered or sold through our online marketplaces by third parties . . . infringe . . . intellectual property rights." (¶ 112)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"Moreover, illegal, fraudulent or collusive activities by our employees could also subject us to liability or negative publicity. For instance, we learned that in early 2011 and 2012 in two separate incidents, certain of our employees had accepted payments from sellers in order to receive preferential treatment on Alibaba.com and Juhuasuan." (¶ 113)	"Moreover, illegal, fraudulent or collusive activities by our employees could also subject us to liability or negative publicity. For instance, we learned that in early 2011 and 2012 in two separate incidents, certain of our employees had accepted payments from sellers in order to receive preferential treatment on Alibaba.com and Juhuasuan." (¶ 118)
"If . . . information disseminated through our . . . websites were deemed by the PRC government to violate any content restrictions, we would not be able to continue to display such content and could become subject to penalties . . . , which could materially and adversely affect our business . . . ." (¶ 115)	"If . . . information disseminated through our . . . websites were deemed by the PRC government to violate any content restrictions, we would not be able to continue to display such content and could become subject to penalties . . . , which could materially and adversely affect our business . . . ." (¶ 125)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"[I]f we do not take appropriate remedial action against sellers or service providers for actions they engage in that we know, or should have known, would infringe upon the rights and interests of consumers, we may be held jointly liable with the seller or service provider for such infringement." (¶ 115)	"[I]f we do not take appropriate remedial action against sellers or service providers for actions they engage in that we know, or should have known, would infringe upon the rights and interests of consumers, we may be held jointly liable with the seller or service provider for such infringement." (¶ 125)
"To protect consumers, brand owners and legitimate sellers and to maintain the integrity of our marketplaces, we have put in place a broad range of measures to prevent counterfeit and pirated goods from being offered and sold on our marketplaces." (¶ 117)	"To protect consumers, brand owners and legitimate sellers and to maintain the integrity of our marketplaces, we have put in place a broad range of measures to prevent counterfeit and pirated goods from being offered and sold on our marketplaces." (¶ 127)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"We have implemented measures to prevent, detect and reduce the occurrence of fictitious transactions on Taobao Marketplace and Tmall including . . . ." (¶ 117)	"We have implemented measures to prevent, detect and reduce the occurrence of fictitious transactions on Taobao Marketplace and Tmall including . . . ." (¶ 129)
"We maintain a 'no tolerance' policy with regard to counterfeit and fictitious activities on our marketplaces." (¶ 119)	"We maintain a 'no tolerance' policy with regard to counterfeit and fictitious activities on our marketplaces." (¶ 131)
"Violation of these laws, rules and regulations may result in penalties, including fines, confiscation of advertising income, orders to cease dissemination of the advertisements and orders to publish an advertisement correcting the misleading information." (¶ 121)	"Violation of these laws, rules and regulations may result in penalties, including fines, confiscation of advertising income, orders to cease dissemination of the advertisements and orders to publish an advertisement correcting the misleading information." (¶ 144)

Appendix B

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in S.D.N.Y.**
"These newly issued measures impose more stringent requirements and obligations on . . . the marketplace platform providers. For example, the marketplace platform providers are obligated to examine the legal status of each third-party merchant selling products or services on the platform and display on a prominent location on the web page of such merchant the information stated in the merchant's business license or a link to such business license . . . ." (¶ 121)	"These newly issued measures impose more stringent requirements and obligations on . . . the marketplace platform providers. For example, the marketplace platform providers are obligated to examine the legal status of each third-party merchant selling products or services on the platform and display on a prominent location on the web page of such merchant the information stated in the merchant's business license or a link to such business license . . . ." (¶ 147)

Appendix B

Alibaba Comparison of Core Factual Allegations

Core Factual Allegations in California[3]	Core Factual Allegations in S.D.N.Y.[4]
The July 16, 2014 Meeting	
"[J]ust two months prior, on July 16, 2014, senior executives from Alibaba had met with senior Chinese . . . officials, who explained that Alibaba's e-commerce businesses were in serious violation of [PRC] laws and regulations . . . ." (¶ 109; *see also* ¶ 28)	"[J]ust two months earlier on July 16, 2014, senior executives from Alibaba had met with senior SAIC and AIC officials and were told that Alibaba's e-commerce businesses were in serious violation of PRC laws and regulations . . . ." (¶ 102; *see also* ¶¶ 5, 7-10, 63-75, 91-92, 94-97, 107, 123, 140, 142, 146, 148, 150, 152, 159, 166-68, 173, 177)

3. Allegations taken from the Consolidated Complaint filed in *Buelow v. Alibaba Group Holding Limited*, No. CIV535692 (Cal. Super. Ct. San Mateo Cty.) on March 25, 2016.

4. Allegations taken from the Consolidated Complaint filed in *In re Alibaba Group Holding Limited Securities Litigation* (also referred to as *Christine Asia Co., Ltd. v. Alibaba Group Holding Limited*), No. 1:15-md-02631-CM (S.D.N.Y.) on July 1, 2015.

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
At the July 16, 2014 meeting, the SAIC "notified Alibaba of a variety of illegal business practices" on its e-commerce platforms, including: • "sale of counterfeit goods," • "sale of . . . prohibited items," • "tak[ing] bribes from merchants," • "faking transactions," • "false and misleading advertising," and • "anticompetitive behavior." (¶¶ 28, 109; *see also* ¶¶ 112, 114, 116, 118, 120, 122)	"At the July 16, 2014 meeting, the SAIC admonished Alibaba for . . . a variety of illegal business practices" on its e-commerce platforms, including: • "sale of counterfeit goods," • "sale of . . . forbidden items," • "[t]aking bribes from merchants," • "faking transactions," • "false and misleading advertising," and • "anticompetitive behavior." (¶ 8; *see also* ¶¶ 70, 109, 111, 113, 115, 117, 119, 126, 128, 130, 132-33, 168, 177, 193)

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
"Chinese regulators . . . had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its ecommerce platforms . . . ." (¶ 110; *see also* ¶ 114)	"SAIC had threatened Alibaba with thousands of financial penalties – each with a target of 1.0% of daily sales on its e-commerce platforms." (¶ 102; *see also* ¶¶ 11, 72, 104, 109, 113, 119, 123, 126, 140, 142, 146, 148, 150, 152, 159, 168, 172, 208)
"Alibaba's financial performance was reasonably likely to be materially impacted in order to comply with applicable regulations . . . ." (¶ 118(d); *see also* ¶ 112).	"Alibaba's financial performance was reasonably likely to be materially impacted as a consequence of yielding to SAIC pressure . . . ." (¶ 104; *see also* ¶¶ 4, 117, 128, 143)

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
The "Red Shield Net Sword" Program	
"[T]he SAIC had already commenced the 'Red Shield Web Sword' special program to clean up rampant abuses on e-commerce platforms, including counterfeiting and consumer fraud, with Alibaba as one of its main targets." (¶ 110; *see also* ¶ 122(a))	"[T]he SAIC had commenced the 'Red Shield and Web Sword' special program to clean up rampant abuses in Alibaba's e-commerce platforms, including counterfeiting and consumer fraud, and that the SAIC considered Alibaba one of its main targets." (¶ 103; *see also* ¶¶ 58-62, 107, 122, 140, 143, 145, 159, 163-66, 177)
The "White Paper"	
"[O]n January 28, 2015, before the opening of trading, . . . SAIC . . . released a White Paper accusing Alibaba of engaging in the very illegal conduct disclosed to Alibaba executives in July 2014." (¶ 127; *see also* ¶ 36)	"On January 27, 2015 in the evening, after market close, . . . SAIC . . . released a white paper detailing Alibaba's illegal business practices . . . previously identified [at] the July 16, 2014 . . . meeting. (¶ 15; *see also* ¶¶ 191-93)

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
"[O]n January 29, 2015, Alibaba issued a press release announcing mixed financial results for 4Q14, and addressing the SAIC White Paper." (¶ 130; *see also* ¶ 40)	"[O]n January 29, 2015, . . . Alibaba issued a press release announcing . . . mixed financial results and address[ing] . . . the SAIC White Paper." (¶ 209; *see also* ¶¶ 17, 210, 220-24, 227)
Various media and analysts covered the "White Paper." (*See* ¶¶ 36-38, 41-42, 44-46, 48, 51, 127-28, 131-32, 134-37, 139, 142-44)	Various media and analysts covered the "White Paper." (*See* ¶¶ 15, 18, 134-135, 175, 195-98, 202-04, 208, 211-12, 214, 216-18, 234)
"[T]he price of Alibaba ADS's dropped" after the release of the "White Paper." (¶¶ 39, 43, 47, 50, 52-53, 129, 133, 138, 141, 145-46)	"[T]he price of Alibaba ADS dropped" after the release of the "White Paper." (¶¶ 16, 19-20, 201, 207, 213, 215)

Appendix B

Core Factual Allegations in California	**Core Factual Allegations in S.D.N.Y.**
Counterfeit Facilitation	
"Alibaba in fact did tolerate the sale of inauthentic goods on its web platforms and either permitted or turned a blind eye to fictitious transactions on its e-commerce platforms." (¶ 120)	"In truth Alibaba tolerated the sale of non-genuine merchandise on its websites and permitted, indeed in some cases created, fictitious transactions on its e-commerce platforms." (¶ 132; *see also* ¶¶ 133, 227-29)
"*Taobao* had optimized its search engines to specifically search and identify counterfeit vendors . . . ." (¶ 120)	"Taobao had optimized its search engines to specifically search and identify vendors of counterfeit products." (¶ 133; *see also* ¶¶ 227-29)
"Alibaba . . . facilitate[s] and encourage[s] the sale of an enormous number of Counterfeit Products through [its] self-described 'ecosystem,' . . . ." (¶ 140)	"Alibaba is intentionally facilitating the offer and sale of counterfeit products on its ecommerce platforms." (¶ 252; *see also* ¶¶ 120, 130-32, 134-36, 151-53, 185, 187, 227-29, 238-43, 252-74)

APPENDIX C — SUNRUN STATE AND FEDERAL LITIGATION

Sunrun Comparison of Alleged Omissions and Misrepresentations[1]

Challenged Statement/ Omission in California[2]	Challenged Statement/ Omission in N.D. Cal.[3]
"[T]he Registration Statement claimed to 'provide homeowners with simple, predictable pricing for solar energy that is insulated from rising retail electricity prices.'" (¶ 39)	Sunrun "provide[d] homeowners with simple, predictable pricing for solar energy that is insulated from rising retail electricity prices." (¶ 86)
Sunrun "focused its resources on markets with . . . favorable policy environments . . ." (¶ 42)	Sunrun "focus[ed its] resources on markets with . . . favorable policy environments . . ." (¶ 81)

1. All emphasis and alterations are removed unless otherwise noted.

2. Allegations taken from the Consolidated Complaint filed in *In re Sunrun Shareholder Litigation*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty.) on Oct. 17, 2016.

3. Allegations taken from the Consolidated Amended Complaint filed in *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal.) on Oct. 21, 2016.

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
"[I]n addition to changes in general rates charged to all residential customers, utilities are increasingly seeking solar-specific charges (which may be fixed charges, capacity-based charges, or other rate charges) . . . [A]ny of these changes could materially reduce the demand for our products and could limit the number of markets in which our products are competitive with electricity provided by the utilities." (¶ 47)	"We rely on net metering and related policies to offer competitive pricing to homeowners in all our current markets, and changes to net metering policies may significantly reduce demand for electricity from our solar service offerings." (¶ 82)

Appendix C

Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
"Utilities, their trade associates, and fossil fuel interests in the country are currently challenging net metering policies, and seeking either to eliminate it, cap it, or impose charges on homeowners that have adopted net metering. . . . Nevada . . . ha[s] metering caps . . . . If the net metering caps in . . . other jurisdictions are reached without an expansion of net metering policies, homeowners in the future will be unable to recognize the cost savings associated with net metering they currently enjoy." (¶ 47)	"Utilities, their trade associates, and fossil fuel interests in the country are currently challenging net metering policies, and seeking either to eliminate it, cap it, or impose charges on homeowners that have adopted net metering. . . . Nevada . . . ha[s] metering caps . . . . If the net metering caps in . . . other jurisdictions are reached without an expansion of net metering policies, homeowners in the future will be unable to recognize the cost savings associated with net metering they currently enjoy." (¶ 82)

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
"Of the states in which we offer our solar service offerings, only Nevada is expected to reach its cap [on net metering] within the next 12 months unless the cap is increased. We currently expect Nevada to reach its cap in the next month unless it is increased. However, legislation has been adopted that requires that an uncapped program approved by the Nevada Public Utilities Commission be implemented in Nevada no later than December 31, 2015. If changes to net metering policies occur without grandfathering to existing homeowners, those existing homeowners could be negatively impacted which could create a default risk from those homeowners. Our ability	"Of the states in which we offer our solar service offerings, only Nevada is expected to reach its cap [on net metering] within the next 12 months unless the cap is increased. We currently expect Nevada to reach its cap in the next month unless it is increased. However, legislation has been adopted that requires that an uncapped program approved by the Nevada Public Utilities Commission be implemented in Nevada no later than December 31, 2015. If changes to net metering policies occur without grandfathering to existing homeowners, those existing homeowners could be negatively impacted which could create a default risk from those homeowners. Our ability

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
to sell our solar services may be adversely impacted by the failure to expand existing limits to net metering." (¶ 47)	to sell our solar services may be adversely impacted by the failure to expand existing limits to net metering." (¶ 82)
Sunrun "currently provided solar energy services in Arizona, California, Delaware, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania and South Carolina, as well as the District of Columbia." (¶ 45)	Sunrun "currently provide[d] solar energy services in Arizona, California, Delaware, Colorado, Connecticut, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania and South Carolina, as well as the District of Columbia." (¶ 84)

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Challenged Statement/ Omission in California	**Challenged Statement/ Omission in N.D. Cal.**
Sunrun's "business was concentrated in certain markets, putting it at risk of region specific disruptions . . . [A]s of March 31, 2015, approximately 58% of Sunrun's customers were in California and [] the Company then expected much of its near-term future growth to occur in California." (¶ 45)	Sunrun's "business was concentrated in certain markets," but Sunrun "identified only California as a state in which it had concentrated business." (¶ 84)

Appendix C

Sunrun Comparison of Core Factual Allegations[4]

Core Factual Allegations in California[5]	Core Factual Allegations in N.D. Cal.[6]
"Sunrun's . . . business entails net metering . . ." (¶ 32)	"Net metering is vital to Sunrun's business model . . ." (¶ 43)
"[N]early half the states that permit net metering have reconsidered their net metering policies over the past year." (¶ 33)	"By the time of its August 2015 IPO, net metering subsidies were under heavy attack in Sunrun's most important markets." (¶ 49)
"On July 31, 2015, NV Energy [a Nevada public utility] . . . filed an application with the Nevada Public Utilities Commission ('PUC') seeking to curtail [net metering programs]." (¶ 36)	"[O]n July 31, 2015, NV Energy [a Nevada public utility] submitted a tariff proposal to reduce inequitable net metering subsidies." (¶ 57)

4. All emphasis and alterations are removed unless otherwise noted.

5. Allegations taken from the Consolidated Complaint filed in *In re Sunrun Shareholder Litigation*, No. CIV538215 (Cal. Super. Ct. San Mateo Cty.) on Oct. 17, 2016.

6. Allegations taken from the Consolidated Amended Complaint filed in *Greenberg v. Sunrun Inc.*, No. 3:16-cv-02480-CRB (N.D. Cal.) on Oct. 21, 2016.

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Core Factual Allegations in California	**Core Factual Allegations in N.D. Cal.**
"If NV Energy got the changes it sought . . . it threatened to destroy Sunrun's . . . business in Nevada." (¶ 36).	"The proposal . . . was extremely unfavorable for Sunrun" and "the net metering subsidies . . . were unquestionably threatened." (¶¶ 57, 58)
"[O]n January 7, 2016, the Company admitted that it was ceasing all operations in Nevada." (¶ 53)	"On January 7, 2016, Sunrun issued a press release announcing that it would cease conducting business in Nevada because the Nevada PUC had cut net metering subsidies." (¶ 95)
"When Sunrun reported its fiscal 2015 results and fiscal 2016 guidance on March 10, 2016, the Company also admitted that residential solar growth would decline in 2016 due to its having halted operations in Nevada." (¶ 53)	"On March 10, 2016 . . . Sunrun issued a press release . . . reporting disappointing fiscal 2015 results. Specifically, the Company admitted that it had failed to meet revenue guidance because of its exit from Nevada." (¶ 97)

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Core Factual Allegations in California	**Core Factual Allegations in N.D. Cal.**
"[I]nvestors learned for the first time the full extent of customer concentration the Company had in Nevada . . . at ~20% of Sunrun's direct deployments." (¶ 54)	"[T]he Company told investors for the first time exactly how concentrated the Company had become in Nevada. . . . where volume grew from almost zero to reach about 20%." (¶ 98)